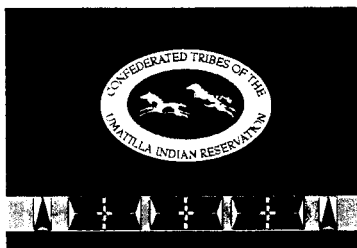


**Confederated Tribes of the  
Umatilla Indian Reservation**

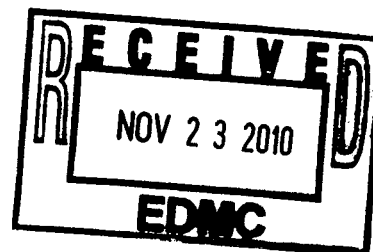
Department of Natural Resources



46411 Timine Way • Pendleton, OR 97801  
(541) 276-3447 • fax (541) 276-3447  
info@ctuir.com • www.umatilla.nsn.us

November 17, 2010

Jill Conrad  
Cultural and Historic Resources Program  
U.S. Department of Energy  
Richland Operations Office  
P.O. Box 550  
Richland, WA 99352



RE: Unanticipated Discovery at the 100-K-63 waste site and comments from the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Cultural Resources Protection Program (CRPP).

Dear Mrs. Conrad,

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Cultural Resources Protection Program (CRPP) has recently become aware of practices of Hanford staff cultural resources activities taking place during remediation at the 100 KE and KW Area, more specifically at the 100-K-63 waste site. The recent discovery of unanticipated archaeological materials associated with the remediation of waste site 100-K-63 (NPCE#2010-100-59) on September 23, 2010, and the resulting investigation suggests that DOE-RL may be improperly interpreting and relying upon 36CFR800.3(a)(1), a no potential to cause effects (NPCE) determination.

That provision governs how an agency determines the need for project review under Section 106 of the National Historic Preservation Act (NHPA). The provision states:

- (1) *No potential to cause effects.* If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part [36CFR800.3(a)(1).]

In the 100-K-63 undertaking, DOE cleared a remediation action under 36CFR800.3(a)(1), ostensibly because the remediation was intended to be of fill material. DOE Cultural Resources Program concurred with CHPRC staff that 36CFR800.3(a)(1) applied and therefore a Section 106 cultural resources review would not be conducted. This is contrary to the clear language of the regulations, which says that an undertaking need not be reviewed if it represents a type of undertaking without the potential to cause effects, not if the particular undertaking is "determined" by someone to have no such

potential. If there is a determination that there will be no historic properties effected, the determination should be under 36CFR800.4(d), after the Section 106 process has been initiated. The NPCE determination essentially short-circuits the review and kicks you out of the 106 process.

By any standard, the excavation and removal of approximately 10 acres of soil to a depth of 15 feet is a type of activity that has potential to affect historic properties. This was confirmed by the Washington State Historic Preservation Office in October 2009 at a meeting with DOE/Tribes in Olympia by Allyson Brooks, State Historic Preservation Officer, who said that there is never a reason at Hanford to clear something under an NPCE because it has been disturbed, and then reconfirmed by Rob Whitlam, Department of Archaeology and Historic Preservation at a recent workshop regarding mitigation of the 100K Area clean-up.

It is clear the conclusions in the CHPRC Critique/Investigation Report Form are flawed. The area where the remediation actions occurred was in a high probability area with known archaeological sites to the east and west. The data regarding depth, though based on GIS data, was interpolated based on aerial photographs and did not provide the resolution necessary to have any great confidence that an archaeological site was not present. In this instance, ground penetrating radar might have provided some data as to changes in soil densities at depth. There should have been a cultural resources review under Section 106 rather than a NPCE. The simple presence of archaeological materials on site is evidence enough of that, whether it was exposed by bull dozer or wind and rain, the materials were within the impact depth of heavy equipment. Further, the CHPRC document mischaracterized the analyses and conclusions provided by the cultural resource staff in the report entitled **100-K-63 Waste Site GIS Fill Analysis Report** (Demaris 2010). In the Demaris report, the author indicates that the project area has “high cultural resource sensitivity” and that measures should be taken to avoid impacting “potential” cultural resources located below the materials to be removed. Specifically, the author notes that there is a “culturally sensitive horizon underlying the APE along the native (pre-Hanford) ground surface” and that “these resources will *generally* [emphasis added] not be impacted by remediation activities” (Demaris 2010:1). In the CHPRC recommendation memo to DOE, however, the only statement concerning cultural resources is that “No archaeological sites are known to exist in the project areas.” This is more than misleading; it simply was not true.

In this instance, excavation occurred to within a foot of an archaeological site. I believe it's unreasonable to speculate that one week of wind and water erosion took off more than a foot of soil. Because this was a remediation action, DOE had no idea how deep the contamination went, so DOE was just as likely to impact an archaeological site as they were to avoid it. Going into a remediation action with the plan that you'll deal with historic properties when you impact them is exactly the sort of planning the NHPA was enacted to avoid. The NHPA commands identification of historic properties, or potential historic properties, then move forward. It is analogous to the National Environmental Policy Act “hard look” prior to committing to a project.

Undertakings that represent these types of activity have the potential to affect historic properties and are required to go through the Section 106 review process as defined by 36CFR800. This instance raises a concern that other undertakings that DOE contractors define as "not the Type of Activity with the Potential to Effect Historic Properties" have similarly been misclassified. We request that DOE stop using this provision until these questions can be answered and procedures for using this provision have been agreed upon with the DAHP, the ACHP and Hanford Tribes. We view misuse of 36CFR800.3(a)(1) as a significant problem, placing DOE is out of compliance with the NHPA.

We would like to either convene a meeting on this issue or discuss it at the next cultural issues meeting. We would like to know the nature of DOE concurrence in the CHPRC recommendation and whether that recommendation was based on the GIS Fill Analysis Report (Demaris 2010) that accompanies the CHPRC memo. If you have any questions, please feel free to contact me or Julie Longenecker, at (509) 371-0643.

Respectfully,



Teara Farrow Ferman, Program Manager  
Cultural Resources Protection Program

Cc:

Administrative Record, DOE  
Mona Wright, DOE  
Kim Ballinger, DOE  
Jim Sharpe, CHRPC  
Ellen Prendergast Kennedy, PNNL  
Rob Whitlam, DAHP  
Allyson Brooks, SHPO  
Audie Huber, CTUIR  
Julie Longenecker, CTUIR  
Rex Buck, Wanapum  
Russell Jim, YN  
Mike Sabota, NPT  
Vera Sonneck, NPT